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COURT OF APPEAL 170

10th December, 1993.

Before: The Bailiff, Single Judge.

Between: GM **Appellant**

And: LM **Respondent**

Application by the Appellant: (1) under Rule 12(1) of the Court of Appeal (Civil) (Jersey) Rules, 1964, for leave to adduce further evidence; and (2) for an order that the Respondent pay the costs of and incidental to this application.

The Appellant on his own behalf.
Advocate N.F. Journeaux for the Respondent.

JUDGMENT

THE BAILIFF: This is an application by the appellant, GM , for fresh evidence to be admitted before the Court of Appeal, when it sits to hear his appeal from a Judgment of the Royal Court of 12th November, 1992.

The principles in relation to the admission of fresh evidence in the Court of Appeal were examined in Hacon -v- Godel & Anor, (27th October, 1989) Jersey Unreported; (1989) J.L.R. N. 4, when the Court referred to a Court of Appeal case heard in Guernsey, Kirk -v- Blackwell (31st October, 1986) Guernsey Court of Appeal which, for the purposes of this application, can be taken to have been considering similar law to ours. There, the Court referred to an extract from 4 Halsbury 37 at p.393, quoting Ladd -v- Marshall (1954) 1 WLR 1489; (1954) 3 All ER 745 C.A. which has

been approved later and which laid down three conditions which must be satisfied before evidence can be received:

> ***"(1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible although it need not be incontrovertible".***

To those rules there are a number of exceptions which are referred to in the White Book in O. 59 r 10/9 as follows:

> ***"Exceptional cases where the Ladd -v- Marshall conditions do not apply, or apply in a modified form.***

The third of those exceptions or quasi exceptions is this:

> ***"Appeals involving the welfare of minor children. The Court will, however, admit fresh evidence which does not satisfy the Ladd -v- Marshall conditions in such cases only if the welfare of the minor requires it".***

Furthermore, the case of G -v- G (1985) 2 All ER 225, decided it is true before the Guernsey case in 1986, has further qualifications to be found at page 230 of the Judgment of Lord Fraser of Tullybelton, as follows:

> ***"Additional evidence dealing with events that have occurred since the hearing in the court below is readily admitted, especially in custody cases where the relevant circumstances may change dramatically in a short period of time. But it must be a matter for the discretion of the court in each case to decide whether the additional evidence which it is asked to look at is likely to be useful or not and to reject it if it considers it unlikely to be so".***

It is in accordance with those principles that I have considered the matters now sought to be admitted by way of fresh evidence by the appellant.

The appellant has filed two Affidavits; the first with his bundle lodged in advance of today's hearing; the second he put in in Court today. In his original Affidavit there were applications to adduce two items of evidence, namely the school attendance records for S and the appellant's daily notes of his movements and the events occurring in the matrimonial home between 2nd February, 1992 and 24th April, 1993. Those two applications have now been withdrawn from the second Affidavit put in this morning leaving a number of other applications to which I shall now turn.

The first of these is an application to hear evidence from Mrs. C the former wife of Mr. C who, the appellant says, had co-habited with the respondent since early January, 1993, and has now married the respondent. It is suggested that an adulterous relationship had existed with Mr. C during 1992, without the knowledge of Mrs. C or the appellant. That evidence would show that the respondent deceived the Royal Court over that relationship by having denied it at the end of October, 1992.

However, that relationship is mentioned in the Judgment of the Royal Court (12th November, 1992) Jersey Unreported, although Mr. C is not named. At page 13 of the Judgement the Court says, referring to the evidence of GM

> " ***Besides he claims that the wife now has a new admirer.***
>
> ***When this was put to the wife in her evidence in chief, she stated that this allegation was rubbish and not true, though she did hope to find somebody else in the future. It had not, she added, been much of a marriage.***
>
> ***We must say at once, that insofar as concerns the proceedings now before us, the case of one parent is either better or worse in this regard than that of the other.***"

Therefore, that matter was very much in the mind of the Court below. The issue before the Court was the question of custody; naturally the behaviour of the parties was relevant, but the paramount interest had to be that of the children. The appellant now seeks leave of this Court with myself sitting as a single Judge to adduce the evidence of Mrs. C.

In my opinion, that would not add anything useful to what was already before the Court below; it is not something which arose after the hearing below that would be relevant to the issue of whether the custody of the children should be the appellant's or the respondent's and therefore the application to adduce this evidence is refused.

The second item of evidence it is sought to adduce is an unpaid dentist's bill of £90, which, it is said, contradicts the respondents evidence that she had in fact disclosed all her outstanding debts. It is a small amount and I do not consider it would be helpful to the Court of Appeal and therefore that application is also refused.

The next application is to adduce evidence of a book maker's makers account to indicate that GM far from throwing money away unnecessarily by gambling, was making a small profit during the relevant time, thus indicating that he was not irresponsible towards his family. The point which emerges clearly from the Judgement of the Court below is that they were concerned not so much with the amount of the gambling but that it

was taking place at all, and it was the principle of the GM's gambling which concerned the Court. Again, I do not think that that is a matter that could be usefully put to the Court of Appeal. The application to adduce this evidence is refused.

The next application concerns an Affidavit of Mr. H to whom a loan of £1,300 had been made by the appellant, through his company. The reasons for that loan are irrelevant. The Court below found that lending money at all in the circumstances in which the family then was, was misguided, and I do not think the reasons for making it are particularly relevant and would not be useful to the Court of Appeal. Again, that application is refused.

Next, we have an application to admit evidence, either from the company owing or from the captain of the cruise liner the [illegible] on which the parties went on honeymoon. In her evidence, the respondent suggested that the appellant spent about two-thirds of his time gambling on the gaming machines on board. The evidence it is sought to adduce by the appellant would suggest that, because these machines were locked up for part of the time it would not have been possible for GM to spend so much time gambling on them. This is really a matter *de minimis*. The question was not the amount of time, but whether indeed he was gambling at all. Again, that is a matter which the Royal Court considered adequately and is not a matter which could be of assistance to the Court of Appeal.

The next applications are linked together in some way. The history of this action is to some extent irrelevant; but it must be remembered that the appellant is appealing against a Judgement of the Royal Court in relation to the custody of the Children which has been fully argued. There were earlier proceedings in relation to an interim injunction which had been imposed by myself in the Royal Court, relating to the care and control of the children.

There was a long hearing during the months of November, December and part of January, 1991-1992, at the end of which the Court made a ruling concerning the question of the children.

The Court gave a short Judgement but reserved its reasons for later. Unhappily, because of matters which it is not necessary for me to go into now, the reasoned Judgment was never delivered. Some short notes, made by one of the Jurats who was sitting, have been supplied to the appellant, after he wrote to me to obtain them. The appellant also submitted to me a list of questions which he wished the Jurats to consider, which again, were put to the Jurats at his request, and they have informed me and have so certified in writing that they consider there is nothing that they would wish to add to what has been previously disclosed.

The appellant also seeks the notes of the presiding Judge, the then Deputy Bailiff, in respect of the injunction hearing. I do not think that is a matter which would be of any assistance.

That application is linked to the appellant's further application that I should order that the transcript of the injunction hearing be made available. Again, he is not specific as to what parts of the transcript he would require and, I repeat, because the appeal is against the finding of this Court in November, 1992 and not against the injunction proceedings, I do not think that those are matters which I can order to be produced for the Court of Appeal, although I appreciate that the argument is that in the injunctive proceedings, evidence was given which was contradicted later.

The next application relates to an Affidavit of Means, sworn by the respondent on 21st September, 1993. This is a matter which arose subsequently to the Judgment under appeal, and the reason the appellant advances for the production of that Affidavit is that it would show that the respondent acted irresponsibly in allowing herself to fall pregnant to her present husband before he was divorced and before they were married. I think that is a matter bearing on the wife's behaviour after the Judgment that I should allow in, and accordingly it will be allowed in, with liberty to the respondent to file a counter Affidavit.

The next application concerns some greeting cards which were sent by GM and CM to each other in 1988. The appellant contends that he had a normal loving relationship with his then wife until the middle of 1989, which the respondent denies. I do not think that that is something which arose after the hearing; it is a matter which could have been available at the earlier hearing, and accordingly I disallow that application.

GM also asks to be allowed to submit a monthly budget of account which, he suggests, would show that his income was fully committed and properly controlled at the time and that there was no income available to him to be a spendthrift, which the Court suggested he was. Again, I do not think that that is a matter which has arisen *ex post facto* and it will not be allowed.

The remaining two applications can be summed up in this way: the appellant wishes to suggest, by producing documentary evidence, that after the last hearing on 30th October, 1992, the respondent, in the words of his Affidavit, *"has continued in a vindictive and unreasonable manner towards the plaintiff by attempting to make him bankrupt when there was clearly no financial benefit in so doing and by refusing him access to his children on Christmas Day and New Year's Day, and both these actions without regard to the needs of the children"*. There is also a suggestion that the respondent's present husband had been acting in an offensive manner to the appellant and the children and had used unnecessary force in reprimanding J.

To my mind, both these matters could be looked into by a fresh report from the Children's Officer and accordingly I will order that such a report be prepared in time for the hearing by the Court of Appeal when these allegations will be examined by the officer concerned and he will place his report before the Court of Appeal.

Kirk-v-Blackwell (31st October, 1986) Guernsey Court of Appeal.

Hacon-v-Godel & Anor (27th October, 1989) Jersey Unreported; (1989) JLR N.4.

Court of Appeal (Civil) (Jersey) Rules, 1964.

Criminal Appeal Act 1968: s.23.

Barnes -v- A.G. (1987-88) J.L.R. 669 C. of A.

Rayden and Jackson: Law and Practice in Divorce and Family Matters (London, 1991): 49.2: p.1388

R.S.C. (1993 Ed'n): O.59/10/9.

G -v- G, [1985] 2 All ER 225 @ p.230.

M -v- M (3rd January 1987) "The Times".

Skone -v-Skone & Anor. (1971) 2 All ER 582.

4 Halsbury 37: paragraph 693.

Ladd -v- Marshall (1954) 1 WLR 1489; (1954) 3 All ER 745 C.A.